SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

Supreme Court, U.S.
FILED
JUN 16
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE R. ARIYOSHI, GOVERNOR,
STATE OF HAWAII, *et al.*,

Petitioners,

v.

SELWYN A. ROBINSON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF CERTIORARI

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STATEMENT

Petitioners George R. Ariyoshi, et al., ("State officials"), submit this supplemental brief pursuant to this Court's Rule 22.6 in response to Respondents' recent filings.

The Solicitor General has recommended that certiorari be granted because "*McBryde* was not a final determination of respondents' rights that can give rise to a ripe taking claim under *Williamson*

County Regional Planning Comm'n v. Hamilton Bank, No. 84-4 (June 28, 1985)." Brief of the United States at 1-2. Because *Williamson County* was decided after the court below acted, the United States suggests that the Court might wish to vacate the judgment, and remand the case to the court of appeals for further consideration in light of *Williamson County*. *Id.* 18-19. Petitioners concur that such a disposition would be an appropriate exercise of the certiorari jurisdiction.

Respondents, however, reject even the Solicitor General's deferential recommendation. The principal reason they advance is that there are no proceedings pending or possible in state court that could obviate any taking claim, sharpen the inquiry into the factors relevant to such a claim, or otherwise render unnecessary the intervention of a federal court.[1]

ARGUMENT

Proceedings Are Pending in the State Circuit Court.

As the Solicitor General correctly recognizes, the Supreme Court of Hawaii's answers to certified questions 1 and 2 establish that no diversion in the Hanapepe watershed may be restrained before a state trial judge makes "a careful assessment of the interests and circumstances involved" upon "continuation

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[1] Supplemental Brief of Respondents Ida Albarado et al. ("Small Owners") in Response to Brief for the United States as Amicus Curiae 5; Supplemental Brief of McBryde Sugar Co., Ltd., in Response to Brief for the United States as Amicus Curiae 2, 5, 6; Brief of Respondent Olokele Sugar Co., Ltd. in Response to Brief for the United States as Amicus Curiae 3-4; Supplemental Brief of Respondents Robinson in Opposition to Petition for a Writ of Certiorari 3-12.

of the [*McBryde*] case at the trial level." Pet. App. 21a, 24a. Determinations would be made under the numerous "limiting doctrines" that channel equitable relief. *Id.* 20a. In answering certified question 5, the state court reiterated that whether an "equitable restraint or the Constitution's prohibition of 'taking' vested property interests will preclude the literal application of the rights posited in *McBryde* has yet to be decided." *Id.* at 42a. These issues arising from application of the *McBryde* principles may be litigated in *McBryde* itself, or a new state court action. *Id.* State statutes obligate the state court to do what is "equitable between the parties," Hawaii Rev. Stat. § 664-34 (1976), Pet. App. 430a,[2] and even respondents concede that the state court is one "of general jurisdiction[,]" Small Owners' Supplemental Brief 2 n.1, and competent to decide constitutional issues.

To the extent there are no "ongoing proceedings" in the state trial court, it is only because respondents have abandoned the state courts, and, petitioners, whatever their current plans, Pet. App. 13a, are subject to contempt if they even so much as "attempt[] to enforce *McBryde,*" Amended Judgment ¶ 3, Robinson Brief in Opposition App. A. But *McBryde* is still a fully pending state-court action because no final judgment has been entered, and no procedural bar blocks adjudication of equitable rights or constitutional claims occasioned by denial of equitable rights. Proper discovery may be taken, and, when the parties are prepared, or the court otherwise orders, the mat-

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[2] McBryde demanded state court equitable relief as early as 1960, Amended Complaint, *McBryde Sugar Co. v. Robinson,* S.P. No. 108 (Hawaii 5th Cir. filed Apr. 25, 1960), Pet. App. 317a.

ter may be heard.[3] *Cf. Geremia v. State,* 58 Hawaii 502, 510, 573 P.2d 107, 113 (1977) (remand for consideration of new theory of relief provides "opportunity to develop facts relevant to the decision"). Respondents' claim that there are no pending state proceedings is unfounded.[4]

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[3] Under Hawaii Circuit Court Rule 12(b), "civil cases" in the state trial court are advanced for evidentiary hearings by a party's submission of a "statement of readiness." Even if the rule does not apply to a chapter 664 proceeding, proper orders could be obtained under Hawaii R. Civ. P. 7(b)(1) (1985), which is identical to Fed. R. Civ. P. 7(b)(1), and applies to chapter 664 cases, Hawaii R. Civ. P. 81(b)(12).

[4] McBryde's claim that the Solicitor General erroneously considers only " 'uses' of water as distinguished from all the other incidents of ownership [that might be protected in state court,]" McBryde Supplemental Brief 6, is also mistaken.

First, McBryde undercounts (a) interests the Solicitor General has considered, *see* Brief of the United States at 16, 18 (and cases cited); (b) opportunities state court rulings might create, *see Reppun v. Board of Water Supply,* 65 Hawaii 531, 560 n.22, 656 P.2d 57, 76 n.22 (1982), *cert. denied,* 105 S. Ct. 2016 (1985); and (c) justifications for interference with "incidents of ownership," *see Williamson County,* 105 S. Ct. at 3126 (Stevens, J., concurring in the judgment); *Kirby Forest Indus. v. United States,* 467 U.S. 1, 15-16 (1984). McBryde then overcounts generally the impact on the taking inquiry of interference with an "incident of ownership," *see United States v. Riverside Bayview Homes,* 106 S. Ct. 455, 459 (1985); *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1005 (1984).

In the end, McBryde concedes that the state courts might well allow valuable uses, *cf.* Pet. App. 86a (value of cane land). McBryde thus repudiates not only the District Court's ruling that *McBryde* necessarily puts McBryde "out of business," *id.* 100a, but also the basis of *Williamson County*'s finality rule—that when "it is impossible to determine the extent of the loss,"

CONCLUSION

For the reasons advanced by petitioners, the United States, and the amici States, the State officials urge the Court to grant the petition for certiorari.

Respectfully submitted,

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it cannot be said "respondent would be denied the economically feasible use of its property," 105 S. Ct. at 3119, 3120 n.12.